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June 19, 2012

Mr. Anthony Herman
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

MUR # 6596

OFFICE OF THE
GENERAL
COUNSEL

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FEDERAL ELECTION
COMMISSION

Re: Complaint Against Crossroads GPS: Request for Expedited Review

Dear Mr. Herman:

Crossroads GPS claims to be a "social welfare" organization established under the Internal Revenue Code for charitable purposes. There has never been any doubt about its true purpose: to elect candidates of its choice to the Presidency and the Congress. Under the pretense of charitable activities, Crossroads has tried to shield its donors – wealthy individuals, and corporations who may be pursuing special interest agendas that are not in the national interest. Complaints about this scheme to achieve anonymity are pending before this agency and before the Internal Revenue Service, but Crossroads seems to believe that it can run out the clock and spend massive sums of money in this election without accounting for a trace of its funding.

Now a federal appellate court has issued a ruling that makes clear that Crossroads is out of time. On June 12, 2012, in the case of *Real Truth About Obama v. FEC*, No. 11-1760 (4th Cir. June 12, 2012), the U.S. Court of Appeals for the Fourth Circuit held that the FEC may, and by statutory mandate should, apply a test to the activities of organizations like Crossroads that will inevitably reveal them to be "political committees", not charities, because their "major purpose" is to elect candidates to federal office. Political committees must disclose their receipts and expenditures in full. In other words, such committees must report to the public the identity of their contributors. For these disclosure purposes, Crossroads is a political committee: this is clear from the test approved by the court that the FEC must now apply.

Five months remain until Election Day. The Commission should act without delay to apply the legal standards approved by the court and hold Crossroads to the same disclosure obligations as all other political committees. Obama for America and the Democratic National Committee request that the Commission move swiftly to ensure that, before heading to the polls, voters are operating with full information about the political interests behind what they have seen on the airwaves.

Forty years after Watergate, the election financing scandal that prompted the creation of this agency, covert corporate and wealthy individual spending is becoming once again standard operating procedure. This agency must act.

I. Crossroads GPS Has the "Major Purpose" of Influencing Federal Candidate Elections.

A. As *Real Truth* has affirmed, the FEC must take into account all the relevant facts in determining Crossroads' true status as a "political committee".

In *Real Truth*, the Fourth Circuit upheld the FEC's case-by-case analysis against a challenge of unconstitutional vagueness. In so doing, the court found that "[t]he determination of whether the election or defeat of federal candidates for office is *the* major purpose of an organization...is inherently a comparative task, and in most instances it will require weighing the importance of some of the group's activities against others." *Real Truth About Abortion v. FEC*, No. 11-1760 (4th Cir. June 12, 2012) at 22-23. The court held that "[t]he necessity of a contextual inquiry is supported by judicial decisions applying the major purpose test, which have used the same fact-intensive analysis that the Commission has adopted." *Id.* at 23. Throughout its opinion, the Fourth Circuit stressed the difference in constitutional standards, and in particular the level of scrutiny, that applies to prohibitions on speech, on the one hand, and the less rigorous standard that applies to disclosure requirements. *Real Truth* at 9-10.

Moreover, the registered tax status of Crossroads does not impede the FEC's ability to find that it is a political committee. In discussing the application of its two-step test to organizations registered with the IRS as 527 organizations, the FEC recognized that "the Commission's enforcement experience illustrates the inadequacy of tax classification as a measure of political committee status". 72 Fed. Reg. 5595, 5598 (Feb. 7, 2007).

The FEC itself believes that its "[e]xisting regulations... leave the Commission with a very effective mechanism for addressing claims that organizations of any tax status should be registered as political committees under FECA". 72 Fed. Reg. 5595, 5596 (Feb. 7, 2007).

B. Crossroads GPS is a "political committee" under the FEC's two-part test.

In determining whether an organization is a "political committee" and is therefore subject to the disclosure, registration and organizational requirements of BCRA, the FEC applies a case-by-case analysis. Under its two-part test, the FEC looks at: (1) the organization's actual conduct – whether it "received \$1,000 in contributions or made \$1,000 in expenditures" and (2) "whether its major purpose is Federal campaign activity." 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007). Under the second prong's "major purpose test", the FEC considers the group's organizational documents, regulatory filings, public statements, appeals for fundraising, and political activities to determine whether the group's "major purpose" is federal campaign activity, namely the nomination or election of a federal candidate. *Id.*

Prong 1: Contributions or Expenditures Totaling \$1,000. To meet the "contribution" or "expenditure" prong of the two-part "political committee" test, an organization must collect or expend at least \$1,000 "for the purposes of influencing" a federal election. 2 U.S.C. § 431(8)-

(9). As demonstrated below, Crossroads expends significantly more than that for the purpose of influencing an election – in fact, several elections.

Of course, precisely because Crossroads has not registered as a "political committee" and has therefore not had to make disclosures to the FEC, it is not possible to know exactly how much the organization has spent on political communications. But there can be no reasonable doubt that out of the millions that Crossroads has both spent and received – and the hundreds of millions in total that it has pledged to collect and spend – it will have easily spent more than the requisite \$1,000 to influence elections and, therefore, to meet this part of the standard applied to establish "political committee" status with its attendant disclosure obligations.

That Crossroads is taking in large sums of money – and certainly more than the requisite \$1,000 – to finance election-related advertising is easily established by reviewing the public reports of its activities and public documents available on Crossroads financing. In fact, Crossroads has acknowledged spending millions directly to influence elections. Already in this election cycle, the organization's independent expenditures total \$2,178,552. In total, Crossroads GPS and American Crossroads spent \$21,553,277 in independent expenditures in 2010. American Crossroads/Crossroads GPS Recipients, 2012, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/recips.php?cmte=American+Crossroads%2FCrossroads+GPS&cycle=2012;>. American Crossroads/Crossroads GPS Recipients, 2010, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/recips.php?cycle=2010&cmte=American%20Crossroads/Crossroads%20GPS>.

This spending record is no secret, as it has been widely reported in the press. T.W. Farnam, *Mystery Donor Gives \$10 million to Crossroads GPS Group to Run Anti-Obama Ads*, WASH. POST (April 13, 2012) ("Crossroads GPS reports in its tax filings spending just over \$17 million on direct election spending").

So there is no question that Crossroads, on the uncontroverted public record, has meet the test of spending at least \$1,000 to influence federal elections. Indeed it has spent many millions of dollars more.

Prong 2: The Major Purpose Test: If an organization spends or receives at least \$1,000 for the purposes of influencing a federal election, the FEC conducts a case-by-case analysis to determine whether the "major purpose" of the organization is to elect or defeat a federal candidate. To make this determination, the FEC looks comprehensively at the organization's documents, regulatory filings, public statements, appeals for fundraising, and political activities. In looking at the totality of Crossroads GPS's activity, only willful blindness could lead anyone to deny or to doubt that Crossroads' "major purpose" is to influence national elections.

(1) *Electoral Purpose of the Advertising*

As noted, a substantial part of the Crossroads spending is explicitly election-related. Yet Crossroads would present itself as a "charity", apparently on the theory that this spending is limited to less than half of its total spending. It claims to spend the rest of its treasury on issue-

advocacy beyond the reach of federal campaign finance disclosure requirements. Yet under Commission regulations, affirmed by *Real Truth*, Crossroads' "issue advocacy" consists overwhelmingly of communications to influence the outcome of elections.

In its decision last week, the Fourth Circuit reiterated the FEC's right to apply the "functional equivalent" test for express advocacy upheld in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) in determining when corporate speech constitutes electoral advocacy. *Real Truth* at 12, 15 (noting that the relevant test is that "for the 'functional equivalent of express advocacy' that was adopted in *Wisconsin Right to Life*. . ."). The court added that the standard is "restrictive, in that [it] limit[s] the application of the disclosure requirements to those communications that, in the estimation of any reasonable person, would constitute advocacy." *Real Truth* at 15.

In applying the "functional equivalent" test to the advertisements in question in *Real Truth*, the FEC found that the group's proposed advertisements constituted electoral advocacy evidencing a clear major purpose of influencing federal elections. In the first ad, "Change", a voice "mimicking" President Obama's lists what the organization claims are the President's policies on abortion and asks the viewer whether this is "the change you can believe in." *Id.* at 4-5. The second advertisement, "Survivor," discusses President Obama's voting record on reproductive rights and claims that it "reveals a lack of character and compassion that should give everyone pause." *Id.* at 5. The Fourth Circuit upheld the FEC's determination that both of these ads constitute the functional equivalent of "express advocacy" the bore directly on the major purpose of the organization.

Application of the same legal standard to Crossroad GPS's advertisements would lead to the same conclusion. The text of three recent Crossroads GPS advertisements – illustrative of the character of their public communications – demonstrate that reasonable minds simply cannot differ over the electoral aim of the organization. Crossroads has built all the ads in question around the promise of building "a new majority". In an election year, it is obvious how a "majority" comes to pass: via the ballot box, through success in an election. And viewers are directed to further information that makes clear that the "new majority" will bring "change" to Washington ("Don't miss out on the opportunity to shape and achieve a New Majority Agenda that will change Washington and America for the better.") <http://www.crossroadsgps.org/wp-content/uploads/2012/01/GPSBrochure-NMA-FINAL.pdf>.*

Crossroads weaves this appeal for a "new majority" creating "change in Washington" throughout its so-called issue advocacy in a fashion that can leave no doubt about its electoral purpose. Consider this ad run in a competitive Senate race:

* While the web communications to which the ads link are not dispositive in analysis of the "functional equivalent of express advocacy", they certainly "lend credence" to such a finding., *FEC v. Wisconsin Right to Life, Inc.*, 551 US 449, 474 (2007), particularly where, as *Real Truth* makes clear, the analysis of "major purpose" rests on all relevant factors.

Since Joe Donnelly went to Washington, America's debt has increased \$3.5 billion per day — up \$7 trillion in less than six years. How? Donnelly has voted for trillions of Barack Obama's wasteful spending. For Obama's \$1.7 trillion health care law. For his wasteful \$1 trillion stimulus. Donnelly even voted to raise the debt limit four times. Tell Donnelly, stop spending and cut the debt. Support the New Majority Agenda, at NewMajorityAgenda.org.

Erik Kleefeld, *Crossroads Rolls Out New Senate Race Ads*, TALKING POINTS MEMO (June 7, 2012), <http://2012.talkingpointsmemo.com/2012/06/crossroads-rolls-out-new-senate-race-ads.php> (describing this advertisement as a "new Senate race ad"). See also, Luke Johnson, *Crossroads Groups Launch \$4.6 Million Ad Campaign Against Democratic Senate Candidates*, HUFFINGTON POST (June 13, 2012), http://www.huffingtonpost.com/2012/06/13/crossroads-groups-launch-ad-campaign_n_1592889.html, Rachel Rose Hartman, *Crossroads Super PACs fund \$4.6 Million Campaign Ad Buys*, YAHOO NEWS (June 13, 2012), <http://abcnews.go.com/Politics/OTUS/crossroads-super-pacs-fund-46-million-campaign-ad/story?id=16557851#.T94CNr89WKw>.

Crossroads has a clear political template for its advertisement advertising:

Advertisement 1: "Spending" airing in Missouri (Senate Race)

"Senator Claire McCaskill was a key Obama Adviser in passing his failed 1.18 trillion dollar stimulus. Claire's votes sent nearly 2 million dollars to California to collect debts - in Africa. 25 million dollars for new chairlifts and snowmaking in Vermont. Almost 300,000 in Texas to study weather – on Venus. While in Missouri, 16 thousand have lost their jobs. Tell Claire to help Missouri, stop reckless spending and cut the debt. And support the New Majority Agenda at newmajorityagenda.org."

Advertisement 2: "How" in Montana (Senate Race)

"Wonder how America's debt has nearly doubled since Jon Tester went to Washington? Instead of being an independent voice for Montana, Tester's voted for Barack Obama's policies 95% of the time – for Obama's trillion dollar healthcare takeover, for the failed trillion dollar stimulus, and voted to raise the debt limit six time for a total of 6 trillion dollars. Tell Tester: stop spending money we don't have, cut the debt. Support the New Majority Agenda at newmajorityagenda.org."

Advertisement 3: "Stopwatch." (Presidential Race)

"Why isn't the economy stronger? In the seconds it takes to watch this, our national debt will increase 1.4 million. In 2008, Barack Obama said, 'we can't mortgage our Children's future on a mountain of debt.' Now he's adding 4 billion in debt every day, borrowing from China for his spending. Every second, growing our debt faster than

our economy. Tell Obama: stop the spending. Support the New Majority Agenda at newmajorityagenda.org."

Another observer notes, "Crossroads GPS's big activities the past year have included ads attacking President Obama over his tax proposals during the debt ceiling showdown and, more recently, ads attacking him over the Solyndra debacle." And, based on the ads, there follows this conclusion: "It's hard to see how such ads do not have plain electoral aims." Alec MacGillis, *Karl Rove's \$10 Million Mystery Donor*, THE NEW REPUBLIC (Apr. 16, 2012), <http://www.tnr.com/blog/the-stump/102717/karl-roves-10-million-mystery-donor>.

Hard indeed.

As the Fourth Circuit in *Real Truth* emphasized, the "major purpose" finding that compels Crossroads to disclose does not rest on any one advertisement, or on all the advertisements. The test rests on a contextual inquiry, taking all facts into account in the particular case. The sweep of the analysis is shaped by the regulatory interest – not to cease speech but to achieve disclosure of its financing. The court addressed this interest in part through its adoption of a standard of review of "exacting" rather than "strict" scrutiny, appropriate for the disclosure interest here:

Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking. The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.

Real Truth at 10, citing Citizens United, 130 S. Ct. 876, 914 (internal quotation marks and citations omitted).

(2) Targeted Ads

These communications are directed to swing or battleground states, further underscoring their electoral purpose. This is a fact about their placement, not a contention. To cite one story among others:

"The Crossroads issue ads also appear to target only those candidates facing real opposition. The group has run more than one ad in contested Senate races in Florida, Massachusetts, Missouri, Montana, Nebraska and Ohio. Vulnerable freshmen Republicans like Reps. Sean Duffy (Wis.), Chip Cravaack (Minn.) and Quico Canseco (Texas) have received supportive issue ads, while vulnerable House Democrats like Reps. Ben Chandler (Ky.), Leonard Boswell (Iowa) and Tim Bishop (N.Y.) have been on the receiving end of negative issue ads."

Paul Blumenthal, *Karl Rove 'Issue Ads' Attacking Elizabeth Warren Help Hide His Group's Donors*, HUFFINGTON POST, 12/14/11, http://www.huffingtonpost.com/2011/12/14/karl-rove-elizabeth-warren-issue-ads_n_1148633.html. See also Chris Moody, *Crossroads GPS Dropping \$7 million on Anti-Obama Ads This Month*, YAHOO NEWS (June 5, 2012), <http://abcnews.go.com/Politics/OTUS/crossroads-gps-dropping-million-anti-obama-ads-month/story?id=16499567#.T9wJnr89WKw>, Lucy Madison, *In New Ads, Crossroads GPS, American Crossroads, Target Senate Dem Candidates in Battleground States*, CBS NEWS (June 13, 2012), http://www.cbsnews.com/8301-503544_162-57452323-503544/in-new-ads-crossroads-gps-american-crossroads-target-senate-dem-candidates-in-battleground-states/, Jim Geraghty, *The Crossroads GPS Ad that Swing States Will See a Lot*, THE NATIONAL REVIEW ONLINE (May 6, 2012), <http://www.nationalreview.com/campaign-spot/300114/crossroads-gps-ad-swing-states-will-see-lot#>.

(3) *Crossroads Has Acknowledged the Electoral Purpose Behind their "Issue Ads"*

Crossroads does not leave any doubt about the electoral purposes behind their "issue ads". The "issue ads" target candidates for federal office in key states with electoral advocacy that is clear under the terms of the FEC regulations, affirmed just days ago by the Fourth Circuit.

Crossroads generally holds fast in its public pronouncements to the fiction that it is a "social welfare" charity. But the truth of the matter sometimes breaks through and Crossroads lets slip its own expectation that these ads would have the impact on the "reasonable person" that the regulations recognize as the basis for finding them to constitute electoral advocacy.

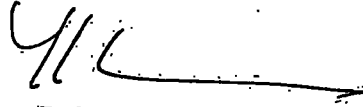
Thus, when Senator Ben Nelson was still a candidate for re-election, Crossroads ran so-called issue ads with an admittedly electoral function. Crossroads communications director, Jonathan Collegio, stated that the organization wanted "Ben Nelson to recognize that 2012 will be an extraordinarily grueling proposition in the case he decides to run". Paul Blumenthal, *Karl Rove 'Issue Ads' Attacking Elizabeth Warren Help Hide His Group's Donors*, HUFFINGTON POST, 12/14/11, http://www.huffingtonpost.com/2011/12/14/karl-rove-elizabeth-warren-issue-ads_n_1148633.html. This statement captures the Crossroads purpose – out of its spokesperson's mouth.

Conclusion

Crossroads GPS states that its "policy is to not provide the names of its donors to the general public." CROSSROADS GPS, <https://www.crossroadsgps.org/donate/> (last accessed June 16, 2012). As an organization with the "major purpose" of electing federal candidates, and thus a "political committee", Crossroads is required to make this disclosure.

Obama for America and the Democratic National Committee respectfully request that the FEC take immediate, expedited actions to remedy Crossroads GPS's failure to make the disclosures required by law.

Very truly yours,

A handwritten signature in dark ink, appearing to be 'R. Bauer', with a long horizontal stroke extending to the right.

Robert F. Bauer
General Counsel

Obama for America and the Democratic National Committee

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SUBSCRIBED AND SWORN to before me this 20th day of June, 2012.

Judith A. R. Casey
Notary Public

My Commission Expires:

December 14, 2014

JUDITH LEIGH CASEY
Notary Public, District of Columbia
My Commission Expires December 14, 2014